offence deserves fairly severe punishment and offenders must expect custodial sentences.

In the instant case, there is nothing wrong in the sentence either in the sense of its being illegal or of its being unsuitable to the admitted facts and circumstances of the case. Nor is there any valid ground for saying that it is manifestly excessive or severe. There is no ground for interfering with the sentence imposed. The appeal is dismissed and the six-month custodial sentence of the lower court is affirmed.

Appeal dismissed.

Reported by *Ng Sheau Jiuan*

Public Prosecutor v Mohd Nadzir bin Mohd Noor

HIGH COURT (KUALA LUMPUR) – FEDERAL TERRITORY CRIMINAL TRIAL NO 38 OF 1985
KC VOHRAH J
27 JULY 1988

Criminal Law – Drug trafficking – Prosecution evidence unequivocal as to where accused obtained the drugs – Cautioned statement containing incriminating and exculpatory parts – Weight of both parts – Exculpatory part and evidence negatived presumption of trafficking – Accused's behaviour consistent with innocence – Dangerous Drugs Act 1952, s 37(d)

The accused was charged with trafficking in 16.77 g of heroin under s 39B(1)(a) of the Dangerous Drugs Act 1952. The evidence was that the accused and W were riding on a motorcycle when they were stopped by a police patrol. When asked for his identity card, W ran away. The accused, however, parked the motorcycle and then threw a package (later found to contain heroin) from the motorcycle. Because the prosecution evidence was unequivocal as to where the accused had taken the package from, the deputy public prosecutor sought to admit the accused's cautioned statement. While a part of the cautioned statement clearly showed the accused admitting to the throwing of the package, another part contained an exculpatory portion which showed that the package was given to him by W and he was told to keep it. The accused did so, not realizing that it contained drugs.

Held, acquitting the accused: (1) The cautioned statement of the accused showed that the accused said the drugs belonged to W who ran away. W had given him the package and told him to keep it when W lifted the seat of the motorcycle and handed the package to him. Clearly, it would have been easier for the accused to run away as he was riding pillion but instead he parked the motorcycle and acted normally all the way through until he threw the package after realizing he had a package in his pocket and he believed it contained drugs. His behaviour prior to his throwing away the package was consistent with his innocence.

(2) The accused's cautioned statement and the evidence negatived the presumption under s 37(d) that he knew the nature of the thing under his control to be drugs.

Cases referred to
1 *Lim Yow Choon* v *PP* [1972] 1 MLJ 205 (refd)
2 *Soo Seng Huat* v *PP* [1968] 1 MLJ 80 (refd)
3 *Chee Chiew Heong* v *PP* [1981] 2 MLJ 287 (refd)

Legislation referred to
Dangerous Drugs Act 1952 ss 37(d), 37(da)(i), 37A

Zaini bin Abdul Rahman and *Abdul Alim Abdullah* (Deputy Public Prosecutors) for the Public Prosecutor.
Balwant Singh and *AS Sidhu* for the accused.

Cur Adv Vult

K C Vohrah J: The accused was charged as follows:

> That you on 17 February 1985, at about 12.20 am, at Jalan Motosikal of Batu 2½, Jalan Kelang Lama, in the federal territory of Kuala Lumpur did on your own behalf traffick in dangerous drugs, to wit, eight plastic packets of heroin weighing a total of 16.77 g and thereby committed an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 (Revised 1980) and punishable under s 39B(2) of the said Act as amended by Act A553.

Two police constables, PW3 and PW4, testified that they stopped a motorcycle on a motorcycle lane which led to Kuala Lumpur. This was on 17 February 1985 at about 12.20 am.

The motorcycle was travelling without lights. The rider of the motorcycle pulled up on a grass table separating the motorcycle lane leading to Kuala Lumpur from the motorcycle lane leading to Jalan Kelang Lama. When asked for his identity card the rider of the motorcycle ran away and was chased by two other policemen.

The pillion rider, the accused, on the other hand was still sitting on the motorcycle. He then got down and kept quiet. Then he stood up the motorcycle on its stand after which he himself stood to the left side of the motorcycle.

One policeman, PW3, stood in front of the motorcycle and faced the accused. The other policeman, PW4, was about ten feet from the rear end of the motorcycle facing the back of the accused.

According to PW4, two or three minutes after the accused had parked the motorcycle he saw the accused throw a package from the left side of the motorcycle to the right side and the package landed on the motorcycle lane leading to Kelang Lama. PW3, too, saw the accused do that. This package had eight plastic packets holding substances which on analysis by a government chemist, PW2, showed that they contained 16.77 g of heroin.

It was in evidence that the place where the police stopped the motorcycle was brightly lit, yet none of the policemen could tell where the accused had taken the package from. PW3 said that once in a while he glanced at the person who had run away implying he missed seeing the accused take the package from somewhere. PW3 stated that it was one minute after the accused had

stood up the motorcycle then he saw the accused throw the package. He said he was about to search him. Under cross-examination, however, he said he searched the accused after he parked the motorcycle and he found nothing on him. He fared badly in his answers to questions posed by defence counsel, by the court and by the deputy public prosecutor as it did appear strange that, if he only glanced at the chase and he said he glanced twice at the fleeing man and he was facing the accused and it was bright there, he could not see the place where the accused had taken the package from. Was it from his person or was it from the motorcycle? And this witness appeared confused when he was asked to demonstrate what the accused did in relation to the motorcycle, where the accused stood and where he and PW4 stood.

The evidence of PW4 also did not appear satisfactory. He too looked at the chase. He faced the back of the accused. He said that the accused, two or three minutes after standing up the motorcycle, threw the package. He also said that before the accused threw the package he did not see him do anything; 'he just stood there'. And he said he did not see whether the accused took anything from any part of the motorcycle. Later, however, he said that he did not see him take anything from the motorcycle because he could see if the accused had done so. He also said he did not see the accused take anything from his person because his back was towards him!

When PW3 and PW4 had given their evidence it was apparent that not only were there discrepancies in the prosecution evidence, the evidence was equivocal as to whether the accused took the package from the motorcycle (and there was evidence that there was a carrier in front of the rider's seat), or he took it out from his own person; and faced with the unsatisfactory evidence so far adduced the deputy public prosecutor sought to make the prosecution's case credible by making use of the cautioned statement made by the accused one day after his arrest.

Defence counsel did not object to the admission of the accused's cautioned statement which was a mixed one. While a part of the cautioned statement clearly showed the accused admitting to the throwing of the package another part contained an exculpatory portion which explained how he had come by the package.

Under s 37A of the Dangerous Drugs Act 1952, it is provided, inter alia, that where any person is charged with an offence against the Act, any cautioned statement voluntarily made by him to certain categories of government officers 'whether such statement amounts to a confession or not ... shall notwithstanding anything to the contrary contained in any law, be admissible at his trial in evidence ...'. It seems clear that the mixed cautioned statement made voluntarily by the accused in this case containing an admission that he threw the package holding heroin and another exculpatory part explaining how he came by the package is admissible under s 37A of the Act. In short the whole cautioned statement was admissible and my duty was to assess what weight I should attach to the incriminating portion and to the exculpatory portion in the context of the whole of the cautioned statement and the evidence adduced by the prosecution.

In this particular case the cautioned statement formed part of the case for the prosecution and the principle is that notwithstanding that a cautioned statement is part of the evidence for the prosecution, and there are facts in the cautioned statement which appear to contradict other parts of the evidence led by the prosecution it is open to the trial judge as a judge of fact to assess the evidence and in so doing accept part of it and reject the rest (see *Lim Yow Choon* v *PP*[1]).

In the cautioned statement the accused admitted that he was a drug addict who had to take two to three tubes of 'dadah' daily. He stated that on 16 March 1985 (I think he meant 16 February 1985) at about 9.30 pm he was at Jalan Chow Kit looking for 'dadah' of which he had to take two to three tubes daily. He saw a person by the name of 'Wak'. He asked Wak whether he had any supply of 'dadah' and the latter said he did not have any but if the accused wanted (some) he could follow him. He went with Wak on a motorcycle in the direction of Jalan Kelang Lama. At one spot Wak left him with the motorcycle and went to a place after which he came back and the accused followed him back on the motorcycle. The motorcycle was stopped by the police and Wak escaped. The accused stated in his statement that at that time he got down from the motorcycle in a normal manner and parked the motorcycle. And he stated that at that time he realized he had a package in his pocket. He threw the package as he believed it was 'dadah'. And then he was arrested.

He was asked by the recording officer if he was a drug addict and he admitted he was. He was asked how much 'dadah' he consumed a day and he replied that it was two to three tubes. He was asked whose 'dadah' it was that the police recovered and he replied, 'The 'dadah' belongs to the rider of the motorcycle who ran away.' He was then asked how it was that the 'dadah' was with him and he replied, 'When the rider of the motorcycle (Wak) 'opened' (lifted) the seat of the motorcycle to take a screw driver Wak gave me the package and told me to keep it. So I kept in my trousers' pocket.'

He had nothing more to add to the statement.

In assessing the cautioned statement of the accused I had to bear in mind that his confession that he threw the package, a declaration against interest, and which I accept, confirmed the evidence of PW3 and PW4 that he threw the package. While PW3 and PW4 did not see where he got the package it was clear from his cautioned

statement that the package was on his person, in his trousers' pocket, before he threw it. Thus on a prima facie basis custody and control of the package had been made out against the accused.

I now come to the exculpatory parts of the statement. They have to be viewed in the context of the presumptions raised under s 37(d) that the accused had possession of the package and that he knew it contained heroin and in the context of the presumption raised under s 37(d)(i) that since the heroin was 16.77 g, that he trafficked in it. In doing this I bore in mind the law that a presumption can be rebutted from the evidence adduced by the prosecution (see *Soo Seng Huat* v *PP*[2] and *Chee Chiew Heong* v *PP*[3]).

As to the question of possession of the package and knowledge that the package contained heroin, his statement was that he only believed that it was 'dadah' after he had realized that he had the package in his pocket, and that was after he had got down from the motorcycle quite normally after Wak had run away. The evidence of PW3 and PW4 in fact in no way indicated that the accused had behaved suspiciously prior to his throwing away the package. The evidence instead was that it was the rider who ran away while the accused sat on the motorcycle; he parked the motorcycle and then stood next to it quietly for two to three minutes and only then did he throw the package. The evidence would seem to bear out the accused's cautioned statement that after Wak had run away then only did the accused realize he had a package in his pocket and that then he believed it was 'dadah'; in other words he only suspected that the package contained 'dadah' after the rider had run away. To my mind the statement and the evidence negatived the presumption under s 37(d) that he knew the nature of the thing under his control to be 'dadah'.

The crux of the charge against the accused was that he trafficked in the heroin. The presumption under s 37(da)(i), predicated on 'possession' of 15 g or more of heroin by a person, is that he trafficked in it. But the statement in the cautioned statement of the accused showed that the accused said the 'dadah' belonged to the motorcycle rider who ran away; Wak had given him the package and told him to keep it when Wak lifted the seat of the motorcycle and handed the package to him. And this statement too has to be viewed in the context of the evidence of both PW3 and PW4 that it was the rider of the motorcycle who ran away; clearly it would have been easier for the accused to run away as he was riding pillion but instead he parked the motorcycle and he acted normally all the way through until, as was pointed out earlier, he threw the package after realizing he had a package in his pocket and he believed it contained 'dadah'. His behaviour prior to his throwing away the package was consistent with his innocence. Thus on 20 July 1988 when the prosecution closed its case I acquitted and discharged the accused.

Order accordingly.

Solicitors: *Balwant Singh Sidhu & Co.*

Reported by *Ng Sheau Jiuan*